No. 14-86

In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

ABERCROMBIE & FITCH STORES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing approximately 300,000 direct members and an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing amicus briefs in cases involving issues of vital concern to the nation's business community. The Chamber often files amicus briefs in cases pending before this Court, and has recently filed amicus briefs in employment discrimination cases, including *Young v. United Parcel Service, Inc.*, No. 12-1226 (Oct. 31, 2014), and *Mach Mining, LLC v. Equal Employment Opportunity Commission*, No. 13-1019 (Sept. 11, 2014).

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The NFIB Legal Center is the nation's leading small business association, representing approximately 350,000 members across

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[1] No counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than amici, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner and respondent have provided written consent to the filing of this amicus brief.

the country. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

Amici's members are employers that are regulated by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and other employment statutes. They are potential defendants in discrimination suits of the sort at issue here (*i.e.*, alleging a failure to reasonably accommodate a religious observance or practice) and, thus, they have a strong interest in the proper resolution of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Title VII prohibits discrimination in employment because of an individual's religion, and that prohibition includes discrimination because of an individual's religious observances or practices, unless the employer is unable to reasonably accommodate such observances or practices without undue hardship. 42 U.S.C. § 2000e-2(a); *id.* § 2000e(j). The question presented here asks whether, to be liable under Title VII, an employer must have actual knowledge that a religious accommodation was required, and whether that actual knowledge must be based on direct, explicit notice from the applicant. Pet. Br. (I). Before the Court can begin to answer that question, however, it is necessary to first examine the origins of the "notice requirement," and to place the underlying religious-discrimination claim in its proper context. With this brief, amici seek to provide the Court with that essential context.

There is considerable doctrinal confusion surrounding religious-discrimination cases alleging a failure to reasonably accommodate a religious observance or practice. No one doubts that an

employer's failure to accommodate an employee's religious observance or practice can, in some situations, give rise to liability under Title VII. The real questions are "under what theory," and "what is the proper remedy." Title VII claims traditionally come in one of two forms: disparate treatment (*i.e.*, intentional discrimination) or disparate impact (*i.e.*, a neutral policy that is discriminatory in its effect). A disparate-treatment claim can give rise to compensatory and punitive damages; a disparate-impact claim cannot. And so for that reason, among others, the label matters.

For years, however, the EEOC, private plaintiffs, and some courts have approached religious-accommodation cases as if they present a third, independent Title VII claim—one of "failure to accommodate"—that requires no proof of discriminatory intent, but that nevertheless gives rise to a claim for damages. Indeed, that is precisely how this case was litigated to judgment (and a $20,000 compensatory-damages award) below. But there are two problems with that approach. First, and most importantly, it allows for the recovery of damages without any showing of intentional discrimination, in direct contravention of the statute Congress enacted. Second, a freestanding "failure to accommodate" claim finds no support in the statutory text, structure, or history. Most religious-accommodation cases do not involve allegations of discriminatory motive or intent and, thus, are not properly characterized as disparate-treatment claims. Such cases instead rest on the employer's application of a neutral employment policy that, absent accommodation, will adversely impact an employee's religious observance or practice. In the

disparate treatment/disparate impact dichotomy, such a claim falls on the disparate impact side of the line.

Perhaps recognizing the flaws in its prior litigating position, the government's merits brief in this Court changes course and reframes this case as one of disparate treatment. The government's novel theory of intentional discrimination cannot be squared with this Court's case law or the EEOC's own formal guidance. And endorsing it would only add more confusion to an area of employment-discrimination law that has already lost its way. This Court should reject the government's invitation to further confuse the law governing claims of religious discrimination, declare that there is no freestanding "failure to accommodate" claim under Title VII, and, at the very least, confirm what the statute makes clear: in the absence of "intentional discrimination," damages are not an available remedy.

ARGUMENT

I. THERE IS NO FREESTANDING "FAILURE TO ACCOMMODATE" CLAIM UNDER TITLE VII

For years both the litigating position of the EEOC and the appellate case law have obscured the legal theory underlying a Title VII discrimination case premised on an employer's failure to reasonably accommodate an employee's religious observance or practice. This has, in turn, distorted the remedies available for such a claim. Plaintiffs have brought claims, and courts have awarded damages, based on a freestanding "failure to accommodate" theory that finds no support in the statutory text, structure, or history. Although the government pursued this

approach below and through the certiorari process, it now abandons that claim, and for good reason. In answering the question presented in this case, the Court should do the same and provide much needed doctrinal clarity to this area of the law.

A. The EEOC Has Advocated And Some Courts Have Recognized A Freestanding "Failure To Accommodate" Claim Without Identifying Its Statutory Source

Until now, the EEOC has litigated this case as if it presented a freestanding "failure to accommodate" claim under Title VII. In the district court, petitioner asserted that failing "'to make reasonable accommodation, short of undue hardship, for the religious practice of employees and prospective employees'" is itself "'a violation'" of Title VII. EEOC Mot. for Partial Summ. J. ("EEOC MSJ") 16, No. 4:09-cv-00602-GKF-FHM (N.D. Okla.), ECF No. 68 (quoting *Pinsker v. Joint Dist. No. 28J*, 735 F.2d 388, 390 (10th Cir. 1984)). Endeavoring to prove such a claim (*i.e.*, "a claim of religious discrimination for failure to accommodate a religious belief"), petitioner argued that it need only prove three things: (1) that the prospective employee "had a bona fide religious belief that conflicts with an employment requirement"; (2) that "she informed the employer of this belief"; and (3) that "she was not hired for failure to comply with the employment requirement." *Id.* The employer would then have the burden to "rebut one or more" of those elements, "show that it offered a reasonable accommodation," or demonstrate that it was unable to do so "without undue hardship." *Id.*

The district court adopted and applied the burden-shifting approach advanced by petitioner. Pet. App.

109a. In doing so, the court acknowledged that this was a fundamentally different test than the one applied in other Title VII cases. *Id.* at 109a n.5. Rather than "'probe the subjective intent of the employer,'" this "'burden-shifting mechanism'" serves only to "'prove or disprove the reasonableness of the accommodations offered or not offered.'" *Id.* (quoting *Thomas v. National Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 n.6 (10th Cir. 2000)). According to the court, deviating from the standard inquiry was warranted because, in a religious-accommodation case, "'Congress has already determined that a failure to offer a reasonable accommodation to an otherwise qualified .. employee *is* unlawful discrimination.'" *Id.* (quoting *Thomas*, 225 F.3d at 1155 n.6). In that respect, the court noted, a "'religious failure to accommodate[] case'" is treated the same as a failure to accommodate case brought under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.* Pet. App. 109a n.5 (citation omitted). Critically, the EEOC sought, and the district court allowed a jury to award, compensatory damages on this claim. *See id.* at 12a.

On appeal too, the EEOC "presented a religious-discrimination claim based upon [respondent's] alleged failure to accommodate" a conflicting religious practice, Pet. App. 21a, and again relied on a burden-shifting mechanism designed to prove an employer's failure to accommodate—and nothing more, EEOC C.A. Br. 25. The court of appeals proceeded based on the understanding that "[r]eligion-accommodation claims are a subset of the types of religion-discrimination claims that an applicant or employee may present under Title VII," Pet. App. 22a; that there are "'several different theories'" that can be asserted under Title

VII, "'including disparate treatment and failure to accommodate,'" *id.* (quoting *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 603 (9th Cir. 2004)); and that, in the words of the EEOC, "'religious accommodation claim[s are] distinct from . . . disparate treatment claim[s],'" *id.* at 23a (quoting *EEOC Compliance Manual* § 12-IV, at 46 (2008)).[2] As the court further explained, the question for a disparate-treatment claim is "'whether employees are treated equally,'" whereas the question for a "'denial of religious accommodation'" claim is whether the failure to adjust a "'neutral work rule . . . infringes on the employee's ability to practice his religion.'" *Id.* (quoting *EEOC Compliance Manual* § 12-IV, at 46).

This case is by no means unique. For years, other courts have adjudicated "failure to accommodate" religion cases as if they presented a freestanding claim under Title VII. *See, e.g., Antoine v. First Student, Inc.*, 713 F.3d 824, 830-31 (5th Cir. 2013); *Wilkerson v. New Media Tech. Charter Sch., Inc.*, 522 F.3d 315, 319 (3d Cir. 2008); *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 133 (1st Cir. 2004), *cert. denied*, 545 U.S. 1131 (2005); *Mann v. Frank*, 7 F.3d 1365, 1368-69 (8th Cir. 1993); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1486-87 (10th Cir. 1989), *cert. denied*, 495 U.S. 948 (1990). Courts have treated religious-accommodation claims differently than disparate-treatment claims. *See, e.g., Chalmers v. Tulon Co.*, 101 F.3d 1012, 1018 (4th Cir. 1996), *cert. denied*, 522 U.S. 813 (1997); *Mann*, 7 F.3d at 1368-70. They have applied a burden-shifting framework designed to determine whether the employer satisfied its accommodation obligation, not

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[2] *Available at* http://www.eeoc.gov/policy/docs/religion.pdf.

whether it acted with a discriminatory motive. *See, e.g., Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 133-34 (3d Cir.), *cert. denied*, 479 U.S. 972 (1986). And some (like the district court in this case) have assumed that a plaintiff may recover damages for an employer's failure to accommodate. *See, e.g., Heller v. EBB Auto Co.*, 8 F.3d 1433, 1441-42 (9th Cir. 1993). These courts have done so without a critical examination of the statutory foundation for a stand-alone "failure to accommodate" claim—or the consequences of recognizing such a claim.

The question presented in this case is a product of that adjudicatory history. It asks this Court to determine the precise contours of the "notice requirement," *i.e.*, one of three elements of the prima facie inquiry designed only to prove a failure to accommodate. But that judicially crafted requirement (whatever its contours) appears to rest on a fundamentally flawed premise: that there is a distinct and freestanding religious-accommodation claim under Title VII. And the premise underlying this entire case—that such a claim can give rise to compensatory damages—is similarly flawed. Apparently recognizing that its prior litigating position is untenable, the government now reframes its claim as one of disparate treatment. *See* Pet. Br. 19. But that only further muddies the doctrinal waters (*see* Part III, *infra*), and it leaves this Court in the unfortunate position of defining a "notice requirement" without understanding how that requirement is (or is not) relevant to establishing a Title VII violation.

B. There Is No "Failure to Accommodate" Claim Under Title VII Absent Disparate Treatment Or Disparate Impact

There is no freestanding "failure to accommodate" claim under Title VII. Instead, the statutory text, structure, and history indicate that a claim of religious discrimination (like any other Title VII claim) must be brought under one of two theories: disparate treatment or disparate impact.

A person aggrieved by an "unlawful employment practice" may bring a civil action against his employer. 42 U.S.C. § 2000e-5(f)(1). The question, then, is what constitutes an "unlawful employment practice." Title VII answers that question in Section 703(a), which is entitled "Unlawful employment practices." *Id.* § 2000e-2(a).[3] Section 703(a)(1) makes it an "unlawful employment practice" to, *inter alia*, "fail or refuse to hire . . . any individual because of such individual's . . . religion." *Id.* § 2000e-2(a)(1). This "principal nondiscrimination provision" holds "employers liable only for disparate treatment," *i.e.*, when an "employer has 'treated [a] particular person less favorably than others because of" their religion. *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) (alteration in original) (citation omitted); *see International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) ("[T]he most obvious evil Congress had in mind" was intentional discrimination.).

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[3] Section 704 describes "[o]ther unlawful employment practices," such as retaliating against an employee for opposing an unlawful employment practice or participating in a discrimination proceeding, but those unlawful practices are not at issue here. 42 U.S.C. § 2000e-3.

Title VII also makes it an "unlawful employment practice" to "limit, segregate, or classify . . . employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of" his religion. 42 U.S.C. § 2000e-2(a)(2); *see id.* § 2000e-2(k). That provision, as interpreted by this Court and as later recognized by Congress, targets "employers' facially neutral practices that, in fact, are 'discriminatory in operation,'" *i.e.*, "disparate impact." *Ricci*, 557 U.S. at 577-78 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

There is no textual support for a third, independent form of discrimination: failure to accommodate a religious observance or practice. The statute as amended does talk about "reasonabl[e] accommodat[ion]." 42 U.S.C. § 2000e(j). But it does so only in the context of defining the term "religion," in a section of the statute entitled "Definitions," separate and apart from the sections describing what constitutes an "unlawful employment practice." *Compare id.* § 2000e ("Definitions"), *with id.* § 2000e-2 ("Unlawful employment practices"), *and id.* § 2000e-3 ("Other unlawful employment practices"). Specifically, "[t]he term religion" is defined to "include[] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* § 2000e(j).

That definition does not set forth an independent prohibition. To the contrary, it makes the inability to

reasonably accommodate a religious observance or practice a *defense* to liability. That is, when an employer is unable to reasonably accommodate a religious practice, that practice is excluded from the definition of "religion" entirely. To be sure, there would be no reason for Congress to include an exception for "undue hardship" if employers were never required to accommodate religion to avoid disparate-treatment or disparate-impact liability. But that merely confirms that an employer who has a discriminatory motive for refusing to accommodate an employee's religious practice, or one that refuses to make an exception to a neutral policy that has a disparate impact, may be liable if it cannot establish undue hardship. Nowhere does Title VII state that, if an employer can accommodate a religious practice without undue hardship, it has a freestanding obligation to do so—separate and apart from the prohibitions on disparate treatment and disparate impact.

When Congress intends to create a stand-alone "failure to accommodate" claim it knows how to do so. The ADA, for example, specifies that to "discriminate against a qualified individual on the basis of a disability includes . . . not making reasonable accommodations" for an employee's or applicant's disability and "denying employment opportunities to a job applicant or employee . . . based on the need [for a] reasonable accommodation." 42 U.S.C. § 12112(b)(5)(A)-(B). Title VII, in contrast, provides a definition of "religion" that informs the meaning of the substantive anti-discrimination provisions. For example, discriminating against an individual "because of such individual's . . . religion" includes discriminating

against that individual "because of" his religious observance or practice, unless accommodating such an observance or practice would be an undue hardship. 42 U.S.C. § 2000e-2(a)(1). Similarly, "a particular employment practice" would cause "a disparate impact on the basis of . . . religion" if it had a disparate impact on a particular religious observance or practice, unless accommodating such an observance or practice would be an undue hardship. *Id.* § 2000e-2(a)(2), (k).

The statutory history confirms this understanding. In 1991, Congress enacted the Civil Rights Act which amended Title VII and transformed Title VII litigation in two critical respects: (i) it provided a damages remedy for certain Title VII violations, and (ii) it codified the burden of proof for disparate-impact claims as well as corresponding defenses. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 3, 1977A, 105 Stat. 1071, 1071-73 (1991) ("1991 Act"). In both instances, Congress legislated with the understanding that there are only two ways of proving actionable discrimination under Title VII: disparate treatment and disparate impact. The stark dichotomy created between the two claims leaves no room for a third, unmentioned, and undefined religious-accommodation claim.

Under the 1991 Act, the remedies available to an employee differ based on the type of discrimination alleged. As originally enacted, "only equitable relief, primarily backpay, was available to prevailing Title VII plaintiffs." *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 534 (1999). The 1991 Act changed that. It provided for the recovery of compensatory and punitive damages, but limited such relief "to cases of 'intentional discrimination'—that is, cases that do not rely on the 'disparate impact' theory of discrimination."

Id.; *see* 42 U.S.C. § 1981a(a)(1) (damages are available if the employer has "engaged in unlawful intentional discrimination," but not if "an employment practice" is "unlawful because of its disparate impact"). And the corresponding right to a jury trial attaches only if the "complaining party seeks compensatory or punitive damages," *i.e.*, if the charge is one of "intentional discrimination." *Id.* § 1981a(c); *see* H.R. Rep. No. 101-644, pt. 2, at 36-37 (1990). The Title VII damages provision says nothing about "failure to accommodate" claims.

That omission is telling. The following two paragraphs of Section 1981a(a) address discrimination claims brought under the ADA. Like Title VII, a damages remedy is provided for claims of "unlawful intentional discrimination," but not for "an employment practice that is unlawful because of its disparate impact." 42 U.S.C. § 1981a(a)(2). Unlike Title VII, a damages remedy is *also* provided for a violation of the ADA provisions requiring employers to make a "reasonable accommodation." *Id.* Not only did Congress expressly mention such a claim, it specified a unique defense for "cases where a discriminatory practice involves the provision of a reasonable accommodation." *Id.* § 1981a(a)(3). In those cases, damages are not available if the "covered entity demonstrates good faith efforts." *Id.* Congress's failure to mention a comparable Title VII claim, let alone specify whether or when damages would be available for such a claim, strongly reinforces the reading otherwise dictated by the statutory text: a freestanding "failure to accommodate" claim does not exist.

The defenses available to an employer also differ based on the type of discrimination alleged. The 1991 Act codified the burden of proof for disparate-impact claims and created a corresponding business-necessity defense. *See* Pub. L. No. 102-166, § 3, 105 Stat. at 1071 (codified at 42 U.S.C. § 2000e-2(k)). An employer can defeat a claim of disparate impact by showing "that the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i). Congress made clear, however, that "[a] demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter." *Id.* § 2000e-2(k)(2); *see* H.R. Rep. No. 101-644, pt. 2, at 24 ("[B]usiness necessity is never a defense to . . . disparate treatment"; it "may be used as a defense *only* against a disparate impact claim." (emphasis added)). Yet again, Congress legislated with the understanding that discrimination claims under Title VII come in only two forms.

Most appellate court decisions recognizing a freestanding "failure to accommodate" claim fail to fully grapple with the statutory text, structure, and history. Instead, they rely on dicta from *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977), stating that the "intent and effect" of the "religion" definition "was to make it an unlawful employment practice under [42 U.S.C. § 2000e-2(a)(1)] for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of

his employees and prospective employees." Reliance on *Hardison* is misplaced.[4]

This Court did not discuss whether the employee's claim sounded in disparate treatment or disparate impact—and it did not need to. The question presented was whether adequate steps had been taken to accommodate the employee's religious observance. The Court concluded that adequate steps had been taken and, for that reason, held that there was no violation of Title VII. There was no need for the Court to elaborate further on the precise source or contours of the Title VII claim; the employee's claim would have failed under any theory.

Moreover, *Hardison* was decided long before the 1991 Act. This is significant for two reasons. First, the need to distinguish between disparate-treatment and disparate-impact claims was significantly less pressing when the same remedies were available for both. It is therefore not surprising that the Court declined to focus specifically on the nature of the statutorily defined theories of discrimination. Second, to the extent there was any ambiguity regarding the existence of an independent religious-accommodation claim, the 1991 Act dispelled it. Compensatory and

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[4] Lower courts have also relied on this Court's decision in *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986). But in that case, the Court expressly declined to "establish" a "proof scheme" for "religious accommodation claims . . . analogous to that developed in other Title VII contexts." *Id.* at 67. The Court focused instead on whether "the employer's proposed accommodation of [the employee's] religious practices" was sufficient. *Id.* at 68. Moreover, any dicta suggesting that the statute creates a stand-alone "failure to accommodate" claim predates the 1991 Act and cannot be reconciled with the statutory text or history for the reasons set forth above.

punitive damages are available for disparate-treatment claims, but not disparate impact; the business-necessity defense is available in a disparate-impact case, but not in a disparate-treatment case; and nothing governs the remedies for, or defenses to, an *independent* "failure to accommodate" claim under Title VII. The reason is simple: there is no such claim.

C. This Is Not Just A Matter Of Nomenclature

The theory of discrimination alleged comes with certain elements, burdens, defenses, and (critically) remedies. For example, the district court in this case granted summary judgment in favor of petitioner without "'prob[ing] the subjective intent of the employer.'" Pet. App. 109a n.5 (citation omitted). It applied a burden-shifting framework that focused solely on establishing whether respondent had offered a reasonable accommodation. *Id.* at 109a-20a & n.5. And that framework failed to identify any disparate impact in the conventional sense—*i.e.*, a differential, adverse effect on a *class* of religious applicants. Thus, without any showing of "intentional discrimination," or even a showing of adverse impact on a broader class, the district court found a Title VII violation and the jury awarded $20,000 in compensatory damages. *See Id.* at 12a; 42 U.S.C. § 1981a(a)(1). Other courts have proceeded in like fashion. *See, e.g., Sturgill v. United Parcel Serv., Inc.*, 512 F.3d 1024, 1034-35 (8th Cir. 2008) (affirming award of compensatory damages after employee proved that employer "fail[ed] to reasonably accommodate [his] religion"). The absence of doctrinal discipline has had real-world consequences for employers.

II. RELIGIOUS-ACCOMMODATION CASES LIKE THIS ONE DO NOT PRESENT DISPARATE-TREATMENT CLAIMS AND CANNOT SUPPORT DAMAGES

"Disparate-treatment cases present 'the most easily understood type of discrimination,' and occur where an employer has 'treated [a] particular person less favorably than others because of' a protected trait." *Ricci*, 557 U.S. at 577 (alteration in original) (citation omitted). The hallmark of a disparate-treatment claim is proof "'that the defendant had a discriminatory intent or motive' for taking a job-related action." *Id.* (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988)); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003) ("Liability in a disparate-treatment case 'depends on whether the protected trait actually motivated the employer's decision.'" (alteration in original) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993))).

In theory, an employer might refuse to accommodate religion in a manner that constitutes disparate treatment. For example, an employer who is willing to accommodate an employee's request to skip a Saturday meeting for a secular reason, but who refuses a comparable request from an employee with a religious reason, may be acting with a discriminatory motive. *See also, e.g.*, *Dixon v. Hallmark Cos.*, 627 F.3d 849 (11th Cir. 2010) (application of policy specifically prohibiting the display of religious items in management offices); *Brown v. Polk Cnty.*, 61 F.3d 650 (8th Cir. 1995) (firing employee, in part, because of his religious activities), *cert. denied*, 516 U.S. 1158 (1996). Such cases fit comfortably within the disparate-

treatment framework and do not require the doctrinal gymnastics attempted by the government in this case.

However, most so-called "failure to accommodate" claims do not allege disparate treatment as that theory is traditionally understood. Take, for example, the *Hardison* case. The charge there was that the employer had applied a facially neutral and agreed-upon seniority system *equally* to employees seeking exemptions for secular reasons and employees seeking exemptions for religious reasons; the operation of that system had an adverse impact on the employee's religious observance of the Sabbath; the employer failed to alleviate that impact through reasonable accommodation; and providing such accommodation would not have caused the employer any undue hardship. *Hardison*, 432 U.S. at 76-85. There was "no suggestion of discriminatory intent." *Id.* at 82.

Other religious-accommodation cases follow a similar pattern: a neutral employment practice has an adverse impact on a particular religious observance or practice, which triggers the employer's duty to accommodate, unless it would be an undue burden. *See, e.g.*, *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 449, 454 (7th Cir. 2013) (employer failed to make exception to neutral leave–and-attendance policy in order to give employee time off to attend to father's religious burial rites); *Heller*, 8 F.3d at 1436-37 (employer failed to make exception to neutral no-leave rule so that employee could attend wife's religious conversion ceremony). As in *Hardison*, no showing was made that the policies or rules were motivated by religious animus or that the employers acted with any discriminatory intent.

The EEOC has endorsed that understanding. In formal guidance that remains in effect, the EEOC explains that "[a] religious accommodation claim is distinct from a disparate treatment claim, in which the question is whether employees are treated equally." *EEOC Compliance Manual* § 12-IV, at 46. "An individual alleging denial of religious accommodation is seeking an adjustment to a neutral work rule that infringes on the employee's ability to practice his religion." *Id.* The EEOC was right then, and it is wrong now.

For the first time, the government characterizes this case as resting on a disparate-treatment theory. Pet. Br. 23-24. The change of position is not surprising: the jury in this case awarded $20,000 in compensatory damages. Pet. App. 12a. And, as discussed above, compensatory damages are available only if respondent "engaged in unlawful intentional discrimination." 42 U.S.C. § 1981a(a)(1). But recharacterizing petitioner's claim as one of disparate treatment is inconsistent with the EEOC's arguments to date, and with Title VII (*see* Part III, *infra*). The EEOC alleged that respondent did not hire Samantha Elauf "because of her failure to comply with" a facially neutral policy (*i.e.*, the "Look Policy"). EEOC MSJ 27. The EEOC never alleged, and the district court never found, that respondent acted with a discriminatory motive when it adopted the Look Policy or that it acted with a discriminatory intent when it declined to grant an exception to that policy. Indeed, the district court granted summary judgment in favor of petitioner based on a "'burden-shifting mechanism'" that admittedly did not "'probe the subjective intent of the employer,'" but instead only considered "'the reasonableness of the

accommodations offered or not offered.'" Pet. App. 109a n.5 (citation omitted). Petitioner did not prove (or attempt to prove) intentional discrimination and, for that reason alone, the district court's judgment awarding damages cannot stand.

The government does not suggest, in the alternative, that this case presents a disparate-impact claim. If it did, it would have to grapple with the fact that the method of proof it pursued below is difficult to square with the proof required to establish disparate impact (let alone the remedy). All disparate-impact claims would appear to be governed by 42 U.S.C. § 2000e-2(k), which codifies the "[b]urden of proof in disparate impact cases." In particular, petitioner would have to show that the challenged policy "causes a disparate impact" on the basis of a protected trait. *Id.* § 2000e-2(k)(1)(A)(i). As interpreted by this Court, that showing requires a demonstration that the challenged practice "'in fact fall[s] more harshly on one *group* than another.'" *Hazen Paper Co.*, 507 U.S. at 609 (quoting *Teamsters*, 431 U.S. at 335-36 n.15 (alteration in original) (emphasis added)). Thus, ordinarily, the plaintiff in a disparate-impact case "must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Watson*, 487 U.S. at 994-95. The Court has applied this standard even when the plaintiff argues that a subjective decisionmaking process makes it difficult to come up with statistical proof of disparate impact. *Id.* at 994. Yet, the EEOC has never attempted to make such a showing in this case, or

offered an explanation as to how it could show disparate impact under Title VII without it.[5]

In the end, the statutory text, structure, and history indicate that Title VII claims come in two and only two variants: disparate treatment and disparate impact. Most religious-accommodation cases (including this one) cannot be premised on a disparate-treatment theory because no discriminatory motive is alleged. A disparate-impact theory, in contrast, requires no "[p]roof of [a] discriminatory motive." *Teamsters*, 431 U.S. at 335 n.15; *see Raytheon*, 540 U.S. at 52-53 ("'employer's subjective intent to discriminate'" is not required in disparate-impact case) (citation omitted). And the gravamen of such a claim is that a "facially neutral" employment practice is "'discriminatory in operation.'" *Ricci*, 557 U.S. at 577-78 (quoting *Griggs*, 401 U.S. at 431). That is effectively what a "failure to accommodate" case of the sort at issue here alleges and, for that reason, disparate impact is the better fit. In any event, absent proof of "intentional discrimination," there is simply no basis for awarding damages.

III. THIS COURT SHOULD NOT REDEFINE DISPARATE TREATMENT TO FIT THE GOVERNMENT'S NEW THEORY

The government's novel theory of disparate

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[5] The Court need not address the precise contours of a disparate-impact-based "accommodation" claim in this case because the only relief at issue, compensatory damages, is unavailable regardless of whether the EEOC could establish disparate impact. Moreover, given the complexities just described, the Court should be hesitant to opine on this issue in a case that does not require it to do so.

treatment departs from this Court's settled case law and would work a significant and troubling change to employment discrimination law.

Petitioner's theory of how a run-of-the-mill religious-accommodation case amounts to intentional discrimination is not entirely clear. The only definition of "intent" alluded to is borrowed from tort law and asks whether the employer "'desires to cause the consequences of his act,'" or "'believes the consequences are substantially certain to result from it.'" Pet. Br. 24 (quoting *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1194 n.3 (2011)). But that meaning of "intent" comes from a very different context. In *Staub*, the supervisors *had* acted with a discriminatory motive. 131 S. Ct. at 1189-94. The only question was whether the supervisor that was motivated by discriminatory animus also intended to cause the adverse employment action. *Id.* The adverse employment action was the "consequence" at issue. Here, it is undisputed that respondent intended not to hire Ms. Elauf (*i.e.*, intended the adverse employment action); the relevant question is why.

And that is where petitioner's theory runs into another hurdle. The key question in a disparate-treatment case is "whether the employer is treating" the employee or prospective employee "'less favorably'" than others because of a protected trait (here, religion). *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (citation omitted). In most religious-accommodation cases, the allegation is not that the employer is treating the employees *less favorably* than others; it is that the employer is required to treat the employee *more favorably*. That, after all, is the nature of accommodation. Petitioner's

discussion ignores the critical backdrop for most accommodation cases (including this one): the existence of a neutral policy that conflicts with the employee's religious observance or practice and, thus, calls for a reasonable accommodation. *See* Pet. Br. 24; *Hardison*, 432 U.S. at 87 (Marshall, J., dissenting) ("The accommodation issue by definition arises only when a neutral rule of general applicability conflicts with the religious practices of a particular employee."). The failure to grant an exception to a neutral policy may sometimes violate Title VII on a disparate-impact theory; but (without more) it does not amount to intentional discrimination.

To hold otherwise would seriously expand and distort the meaning of disparate treatment that has persisted for several decades. The Court has often described "disparate treatment" as "'the most easily understood type of discrimination.'" *Ricci*, 557 U.S. at 577 (quoting *Teamsters*, 431 U.S. at 335 n.15). No longer. If petitioner is correct, an employer could be charged with intentional discrimination (and face an accompanying demand for compensatory and punitive damages) whenever it applies a rule of general applicability that adversely impacts the religious observance or practice of an employee or prospective employee. If that were the law, the plaintiff in *Hardison*, who was terminated because he refused to report to work on Saturdays, could have argued that his employer engaged in intentional discrimination because it (somehow) treated him differently because of his religion. The plaintiff in *Adeyeye*, who was terminated after traveling to Nigeria to lead his father's burial rites after his employer denied his request for unpaid leave, could have argued that his

employer intentionally discriminated against him "because of" his religion. And so on. Nevermind that there was "no suggestion of discriminatory intent," *Hardison*, 432 U.S. at 82, in either of these cases. Disparate treatment has never been so understood, and providing the complaining party with a damages remedy that Congress did not provide is no reason to start now.

In examining the government's argument in this case, the Court should also consider that this is only one of many occasions in which the EEOC has taken an aggressive position that would open employers up to compensatory and punitive damage awards, and would push disparate-treatment claims well beyond the limits of Title VII. In *Young v. United Parcel Service, Inc.*, the government did not argue that the failure to provide an accommodation to a pregnant employee violated the disparate-impact provisions of Title VII; it argued that the employer's actions constituted disparate treatment. According to the government, "[a] policy need not explicitly mention pregnancy-related work limitations in order to be facially discriminatory under Title VII," and UPS's policy denying accommodations to *both* pregnant and non-pregnant employees because their condition occurred off the job "discriminates on its face against pregnant women." U.S. Br. 15 (Sept. 11, 2014). Likewise, in *EEOC v. Catastrophe Management Solutions*, the EEOC alleges disparate treatment and seeks punitive damages against an employer that applied a facially neutral dress policy to prohibit dreadlocks on the theory that "the people *most adversely and significantly affected* by a dreadlocks ban are

African Americans." EEOC Br. 31, No. 11-13482 (11th Cir. Sept. 22, 2014) (emphasis added).[6]

It is not difficult to understand why the EEOC would like to re-label disparate-impact claims as disparate-treatment claims. Disparate-treatment claims do not require a showing of class-wide impact, are not subject to defenses based on business necessity, and can support compensatory and punitive damages. Transforming disparate-treatment claims into disparate-impact claims would therefore give the Commission a bigger stick, which it could wield more freely. But Congress drew a distinction between disparate treatment and disparate impact for a reason. This case provides the Court with an opportunity to reaffirm that neither courts nor the EEOC can disregard that critical distinction.

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[6] *Available at* http://www.chamberlitigation.com/eeoc-v-cms.

CONCLUSION

For the foregoing reasons, and those set forth in respondent's brief, the judgment of the court of appeals should be affirmed.

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